Flores testified that before he tested the stopper he inspected it visually without opening the clamps and observed nothing wrong with it. He further testified that the work area, which was only 18 inches wide, seemed small but, though he had frequently performed the stopper test before, he had never experienced a stopper failure and did not realize the significance of or report this space inadequacy. Since the evidence amply sustains the inference that the unseaworthy stopper condition caused the accident, and the ship owes to both seamen and longshoremen employed about the vessel an absolute duty to maintain for their use appropriate and seaworthy equipment (*Seas Shipping Co. v. Sieracki*, 328 U.S. 85), the jury was justified in its implied finding that even if Flores were in some way negligent, his conduct did not constitute a proximate cause of the accident. As appellant condedes, there is nothing specific in the record from which it can be determined whether or not the jury found Flores contributorily negligent, and appellant presumes merely that since provable damages were substantially lower than the verdict, the jury failed to apply the court's instruction to reduce them in proportion to Flores' negligence.

We perceive no sound basis for appellant's assumption that the jury defected in its responsibility to consider Flores' comparative negligence, if any, or to segregate as directed the instructions given by the court and apply only those appropriate in resolving the respective issues. We are not impressed with appellant's premises that the amount of the award, in and of itself, discloses a misapplication of law by the jury.

We find herein, moreover, no miscarriage of justice with respect to the jury's verdict that Thor-Dahl is not entitled to indemnity. The United States Supreme Court, in a landmark decision (*Ryan Co. v. Pre-Atlantic Corp.*, 350 U.S. 24), imposed upon stevedoring companies generally an implied warranty of workmanlike service and the liability of Crescent must be determined in this contest. The jury was, nonethelss, justified in inferring from the evidence either that no breach thereof occurred or that, in any event, defective performance by Crescent did not proximately cause the accident.

Testimony disclosed that the custom and practice among San Diego longshoremen at the time of the accident was to make a visual inspection of the ship's gear and proceed to use it if it appeared to be in good condition without first taking it apart or examining it for hidden or latent defects. This accords with Flores' testimony that he observed no gross defects in the stopper before its use. The law would impose an untoward burden on the stevedore company to require that its employees dismantle and inspect the ship's equipment for latent defects prior to use.

Appellant refers to rule 9.52(b)(3) of the Safety and Health Regulations for Longshoring (Code of Federal Regulations, volume 29, part 9 to sub-title A, effective March 21, 1960, and in force at the time of the accident) which provides that stopper clamps shall not be used unless they appear to be in good condition and free of paint and dirt which would prevent their being drawn tight, but we have been referred to no decision which has interpreted this regulation to impose on the stevedore company the duty to discover this condition by taking the clamps apart.

Appellant observes that the shipowner's breach of its duty to maintain a seaworthy vessel no longer constitutes an absolute bar to indemnity from the stevedore company. Decisions subsequent to *Ryan* ". . . have made clear that the stevedore's obligation to perform with reasonable safety extends not only to the stowage and handling of cargo but also to the use of equipment incidental thereto, Weyerhaeuser S.S. co. v. Nacirema Operating Co., 335 U.S. 563, 78 S.Ct. 438, including defective equipment supplied by the shipowner, Crumady v. The J. H. Fisser, supra, cf. Waterman S.S. Corp. v. Dugan & McNamara, Inc., 364 U.S. 421, 5 L.ed.2d 169, 81 S Ct 200, and that the shipowner's negligence is not fatal to recovery against the stevedore." (*Italia Societa v. Oregon Stevedoring Co., Inc.*, 376 U.S. 315, 319-320.)

The shipowner is entitled to relief where the stevedore company induces the accident by bringing into play the hazardous condition (*Crumady v. "Jochim Hendrick Fisser"*, 358 U.S. 423; *Weyerhaeuser S.S. Co. v. Nacirema Co.*, 355 U.S. 563; *Pettus v. Grace Line, Inc.*, 305 F.2d 151) The application of this principle is, however, limited to circumstances where the stevedore company knew and recognized the existence of the defective condition, and the use of unseaworthy equipment despite such knowledge constituted the fatal breach. (*Crumady v. "Jochim Hendrick Fisser", supra; Matson Terminals, Inc. v. Caldwell*, 354 F.2d 681.) We have been referred to no decision which extended protection to the shipowner when the latent defect was unknown to both the shipowner and the stevedore company. The evidence, moreover, does not command the inference that the stevedore company in

the reasonable and workmanlike performance of its services should have discovered this dangerous latent condition prior to the operational test of the stopper. Appellant concedes that "there is no other conceivable way (except by taking apart the stopper) in which the stevedore company could . . . make certain the stopper was free of paint and dirt which would prevent it from being drawn tight," but urges that a breach of workmanlike service may be presumed from the mere fact that an accident resulted in the performance of the customary test. Even if we agreed, we would not be entitled to thus invade the province of the jury.

In this regard appellant complains of the following instruction, clearly limited in applicability to the case for indemnity against the stevedore company: "You have been instructed that the stevedore company owes a duty to the shipowner to conduct its operations, through the exercise of ordinary care, in a reasonably safe manner.

"However, the stevedore company does not have a duty to the ship to discover and remedy a hidden or latent defect of which it was not informed and which is not obvious upon cursory inspection." Appellant strongly objects to the adjective "cursory" as inadequate to describe the duty of inspection which the stevedore company bears under its contractual relationship with the shipowner. The selected language taken out of context may imply a superficial inspection generally inappropriate to circumstances so fraught with potential hazard as the unloading of a ship's heavy cargo but this does not compel the conclusion that any miscarriage of justice occurred in the trial. This terminology is, moreover, supported by at least two recent decisions of the United States Court of Appeals. "We hold that an im-

plied warranty of workmanlike performance by a stevedore does not place upon him a duty to discover defects in the apparatus or equipment furnished by the vessel being loaded or unloaded which are not obvious upon a cursory inspection." (*Ignatyuk v. Tramp Chartering Corp.*, 250 F.2d 198, 201; relied upon in *Cia Maritima Del Nervion v. James J. Flanagan Ship. Corp.*, 308 F.2d 120.)

The accident resulted from a hazardous and latent unseaworthy condition of the vessel, which it is the shipowner's responsibility to maintain. While the negligence of the shipowner may not bar its recovery from the stevedore company (*Italia Societa per Azioni de Navigasione v. Oregon Stevedoring Co., supra*, 376 U.S. 315) still the stevedore company should not be charged on its warranty by reason of failure to make a cautious inspection of the ship's gear (*Cia Maritima Del Nervion v. James J. Flanagan Ship. Corp., supra*, 308 F.2d 120). It is only those defects which have been in fact observed by the stevedore company for which it may be responsible if it uses the equipment thereafter without ascertaining that the condition has been remedied. (*T. Smith & Son, Inc. v. Skibs A/S Hassel*, 362 F.2d 745.)

We are compelled to conclude that the language of the court in *Ignatyuk v. Tramp Chartering Corp., supra*, describes the duty of the stevedore company with sufficient accuracy from a practical perspective. This is true for the significant reason that any inspection which would impose upon the stevedore the duty to dismantle the ship's gear would be impractical and prohibitive in cost to the shipowner itself.

"'Certainly the shipowner would not only object but would prohibit the dismantling of every piece of ship's gear, such as winches, lights, etc. in a professed effort by the stevedoring company to ascertain whether or not the ship's own appurtenances were seaworthy.' *Ray v. Compania Naviera Continental, S.A.*, D.Md. 1962, 203 F. Supp. 206, 211." (*Cia Maritima Del Nervion v. James J. Flanagan Ship. Corp., supra*, p. 125.)

The judgment is affirmed.

FOURT, J.

We concur:

WOOD, P. J.

LILLIE, J.